No. 80-231

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,
Appellants,

v.

STATE OF INDIANA, et al.,
Appellees.

On Appeal From The United States District Court For The Southern District of Indiana

BRIEF OF THE STATE OF ILLINOIS, *AMICUS CURIAE* IN SUPPORT OF THE MOTION TO AFFIRM

TYRONE C. FAHNER
Attorney General, State of Illinois
Room 900
160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2501

HARVEY M. SHELDON
LINDA L. ROSS
Suite 2300
One North LaSalle Street
Chicago, Illinois 60602
(312) 346-7800
Of Counsel.

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STATEMENT OF INTEREST

The State of Illinois probably has more at stake in the outcome of this case than any other state of the Union. Illinois ranks third in the nation in number of acres of prime farmlands and contains an abundance of proven recoverable bituminous coal reserves. Illinois' policy, law and regulation is dedicated now, as it was prior to enactment of the Surface Mining Control and Reclamation Act of 1977 (the "Act"), to the maximization of the benefits of these resources and the minimization of harm to its citizenry from their use.

If the judgment of the Federal District Court of the Southern District of Indiana should be overturned by this Court on the basis that the Constitution allows federal government control over the handling of private land (including mineral resources) and the post-mining land use of land in a state, then the right and sovereignty of the State of Illinois and its local citizenry and municipalities to determine land development and use within their borders will be mortally wounded. At least 9 million acres of Illinois prime farmland would be effectively subjected to the status of a federal province, and Illinois and its citizens would be deprived of their reserved rights under the Tenth Amendment to the Constitution of the United States. For these reasons, Illinois supports the State of Indiana, and agrees with the conclusions of the National League of Cities and its other sister states as expressed in their brief as *Amicus Curiae* submitted to this Court in support of the Motion to Affirm the decision below.[1]

The positions urged herein are based upon the premise, expressed at length in the lower Court's decision (Slip Op. pp. 22-25), that the prime farmland provisions of the Act, which were found below to exceed the Commerce Clause power and to invade the Tenth Amendment, will be imposed by the Department of the Interior within the state in any event. The provisions will be imposed directly, in the event a state does not seek or obtain program approval from the Secretary of the Interior, or indirectly, and subject to federal control, in the event a state program is authorized. Illinois supports a strong,

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[1] Illinois expressly reserves its support of the decision below insofar as it might be read to find certain sections of the Act violative of due process of law, except as such findings were made on an "as applied" basis to the specific evidence and facts found before the Court below. In general, pre-mining showings as a condition of permit issuance and bonding provisions are considered by Illinois to be part of a responsible program of regulation of mining. Illinois itself has historically utilized such provisions respecting coal mine permits.

independent state legislative effort to require land preservation and reclamation by coal mining operations, which effort might, in the judgment of state officials and the State General Assembly, include some or all of the same or similar provisions invalidated by the court below as requirements improperly imposed by the Federal government upon states and their citizens.

ARGUMENT

I.

ILLINOIS' STATE AND LOCAL GOVERNMENT FUNCTIONS ARE INFRINGED BY FEDERAL AUTHORITY TO DETERMINE THE LAND USE OF PRIME FARMLANDS AND THE AREA IN WHICH COAL SHALL BE MINED.

Federal designation of land use of reclaimed prime farmland, and determination of lands which are unsuitable for coal mining, will impair the integrity of Illinois' state and local governments, and will diminish their ability to function effectively in a Federal system. The most fundamental loss to Illinois and its citizens that arises from the provisions held unconstitutional by Judge Noland is the ability for the State independently and freely to make its own laws on the subject of the use of its resources and land use within its borders. Under the Act, all Illinois' laws on the subject of coal mining and coal mined land reclamation become subject to the scrutiny of the Secretary of Interior. See Act, § 505, 30 U.S.C. § 1255. While the Commerce and Supremacy Clauses of course enable federal legislation to occupy the field of a subject of interstate commerce, this case represents the well-documented judgment of a federal district court, after full trial, that certain of the requirements imposed by Congress on coal mine operators are directed at a subject having at best a trivial impact on interstate commerce: the handling, replacement and post-mining land use of certain farmlands defined as "prime" because of their favorable crop production capacity and historical use, and the designation of lands unsuitable for mining within a sovereign state.

The Surface Mining Control and Reclamation Act works a severe and disabling injury to the functioning of state and local government in Illinois because of the imposition of federal dictation of the special handling of prime farmlands, an outright usurpation of sovereignty with respect to conditions upon the ability to mine where prime farmlands overlay coal in Illinois, and a displacement of local decision making on the suitability of lands for mining. As will be discussed in the second part of this *Amicus Curiae* brief, almost all Illinois coal mines (both surface and underground)[2] contain overlying prime farmland so as to bring the disputed provisions of the Act into play at almost every significant minesite.

Illinois suffers economically, and state government's delivery of services is directly affected, by the Act's prime farmland requirements. Although Illinois is the nation's fourth largest coal producer, Illinois coal is not very much in demand relative to other state's coal. Despite Illinois' vast reserves and their attractive heat value per pound, the relatively high sulphur content of its coal coupled with stringent air quality and emissions requirements applicable to its combustion have flattened demand for Illinois coal. The federal Act, in Title IV, not directly at issue, imposes a severance tax on Illinois coal.

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[2] It is very important for the Court to realize that underground coal mining is being subjected by the Department of Interior to the same rules as surface mining. See Permanent Regulatory Program. 30 CFR Parts 816, 817, and 823. Very serious technical and legal problems occur as a result of this approach, including the impossibility of assuring restoration of land disturbed for the construction of facilities which will stand for several decades. Judge Flannery, in the judicial review case challenging the Permanent Program regulations found the Secretary to have been too facile in his application of identical rules to underground mines. Virtually all recovery of coal in Illinois is affected by these disputed provisions. Illinois argued unsuccessfully in the District Court that underground mines were not intended to be covered as lands "to be mined" under the Act, Section 510(d)(1), 30 U.S.C. § 1260(d)(1). *In Re: Permanent Surface Mining Regulation Litigation,* No. 79-1144. (D.D.C. 1980)

Illinois' "share" of the moneys is withheld unless Illinois changes its laws to conform to federal law on the subjects complained of below. This abandoned mined land fund, while of great merit, thus collects the very marginal severance taxes which the Illinois coal market might afford if imposed directly by the state, and holds them "for ransom." Likewise, at this time, some 1860 miners are out of work in the Illinois coal fields, while another 400-600 are working short work weeks. In the past year, five large Illinois coal mines have closed. At least two of these closures are relatable in part to the implementation of the prime farmlands provisions complained of below. The burden of this unemployment is borne directly by Illinois' government, state and local, in the provision of welfare services and the erosion of income tax base. By federal dictation of the terms on which, and whether, coal shall be mined, Illinois' citizens, both the employed and the unemployed, are deprived of a direct voice in their economic and environmental destiny.[3]

Only some 5,000-6,000 acres of Illinois lands are newly mined annually. All of this acreage is subject to prompt, strict reclamation. By contrast, in 1979, some 327,000 farmland acres

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[3] The Act purports, in one of its "findings", specifically Sec. 101(f), to denote the states as the entities which should have the primary governmental responsibility for developing the regulations. The Secretary's interpretation of this finding was to issue his complete set of regulations, and to require states to have regulations "no less stringent than his regulations (30 CFR 730.5). If a state could demonstrate that it had a better alternative for any provision, based on local differences, it could submit them under the "state window" provision (30 CFR 731.13(c). The United States Court of Appeals for the District of Columbia has described the "State Window" as a "one-way mirror." The adopted regulations of the states which have already obtained federal approval, and the lists of problem areas of state submittals for states which have not yet obtained approval, support this description. *In Re: Permanent Surface Mining Litigation*, (Peabody Coal Co., Appellant) No. 80-1308, decided by the United States Court of Appeals, D.C. Cir., July 10, 1980, Rehearing *En Banc* Ordered and Pending.

(not all "prime") were in voluntary "set aside" programs. The federal government paid the owners of those lands more than $7 million dollars not to grow crops. Even if Illinois' annual mined acreage were to double overnight, it still would require some 32 years to mine the land in Illinois set aside deliberately last year to alleviate low prices in the farm commodities markets. In fact, lands mined in Illinois are restored to their optimal use, and rowcrop quality lands must be restored to rowcrop capability under Illinois law. Appendix A is an excerpt of relevant provisions of Illinois law in effect since 1975, well before the passage of the federal Act. Ch. 96½, Ill.Rev.Stats. par. 4507 (1979).

The State also has an interest beyond that of protecting the role of making land use designations. Rights of citizens of the State will be infringed if the prime farmland use provisions are allowed to stand.[4] By requiring a mine operator actually to use the reclaimed land as farmland until yields reach those of surrounding lands, the Act deprives the owner, who farms for a living, of the use of his property during the time the operator must farm the land.[5] The Secretary of the Interior has ruled that the Act allows preparation of the land prior to cropping to continue for up to ten years (30 CFR 823.15(b)) and to require at least three successive years of yield which are equivalent to yields from surrounding farms (30 CFR 823.15

[4] In such a case, this Court has allowed one standing to assert the rights of third persons when enforcement of the challenged provisions against one would result indirectly in the violation of third parties' rights. *Warth* v. *Seldin,* 422 U.S. 490, 510 (1975). The Tenth Amendment expressly provides for the reservation of rights to the States and their citizens of rights not granted to the federal Government.

[5] The State of Illinois has received inquiries from farmer-lessors about the length of time they must wait after mining before they may farm their land again.

(e)(i)). This interpretation indicates that an owner's land could be occupied by the coal mine operator as many as thirteen or more years after mining and neither the Secretary nor the Act puts an absolute maximum time limit for compliance with the Act's requirement to reach equivalent yields other than "a reasonable time." An owner should not be deprived of the use of his land for such long periods of time. His land's use should not be designated by a national legislature constituted of representatives from all fifty states. Further, local governments should not be deprived of their traditional right to designate land use for the length of time which will be required to meet the Act's requirement.[6]

What especially concerns Illinois is Congress' apparent decision that prime farmland, once affected, must be returned to an actual use of crop production, regardless of the legitimate needs of its growing population as traditionally determined by locally chosen officials. One irony of the requirement of returning prime lands to cropland is that it removes from alternate use the very lands whose agricultural productive capacity is most in dispute. The faces of communities can change drastically over a ten to fifteen year period, and state and local governments should be allowed to provide for such changes so there will be no possibility of an operator's having to farm reclaimed land while a growing community expands around him and urbanization thereby occurs on unmined prime farmland in the surrounding area. In Illinois, almost 100,000 acres of prime farmland are taken out of crop production annually, including only 5,000 or 6,000 acres taken temporarily

[6] The constitutionality of the Secretary's rule requiring that where prime farmlands are proposed for mining "the post-mining land use of these prime farmlands will be cropland", 30 CFR § 785.17(d)(1), and related provisions interfering with state and local decisions on land use has been challenged by Illinois in the judicial review case, and was decided adversely to Illinois by the District Court. *In re Permanent Surface Mining Regulation Litigation,* No. 79-1144 (D.D.C. 1980), appeal pending.

for the use of coal mining. In many communities in Illinois, there is no practicable choice of another type of land to be affected by expansion of communities and public roads and facilities.[7]

Illinois is thus before this Court in less than the happy position of undoubtedly appearing to some of its citizens most concerned with the preservation of farmland and the values of community life associated with farming, to oppose good reclamation law. To the contrary, in fact, Illinois' government finds workable and reasonable as a police power measure, appropriate for a state to enforce, the substance of § 515(b)(7), 30 U.S.C. § 1265(b)(7), which includes the provisions for soil handling and reclamation of prime farmland properly found by the Court below to be outside of Congress' power to impose

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[7] The danger to Illinois from federal control of prime farmland use is not limited to its mining counties. Illinois contains an estimated 23.8 million acres of prime farmland and other farmland which is used to produce rowcrops. Approximately the southern two-thirds of Illinois is underlain by bituminous coal reserves; Illinois contains approximately twenty-five per cent of the nation's bituminous coal reserves. The total of estimated coal reserves in Illinois is 162 billion tons of which 30 billion tons, or roughly 1/8 of the nation's total recoverable coal reserves of all types, is recoverable under present technology. Of this 30 billion tons, about 30-40% is mineable by surface mining methods and the rest are mineable by underground mining methods. Prime farmlands cover at least 50 to 60% of the coal reserves in the state, and are interspersed so as to cover for practical regulatory purposes a much greater percentage of mined land.

Because of the large size of Illinois' coal reserves and other reserves underlying Indiana and Western Kentucky, one practical effect of allowing the Interior Department to prescribe land use controls that help keep this coal from the marketplace is to tend to give to the Interior Department monopoly power over coal resources. Much of the coal mined in the West is coal from federal lands or lands located such that federal lease rights control its being mined. Thus, without paying for the nation's largest energy supply, the federal government, by land use control, can effectively see to the maximization of federal profit from coal development.

upon states and their citizenry. Illinois' own law served in part as a model for these provisions. Other provisions such as § 510(d)(1), 30 U.S.C. § 1260(d)(1), or § 519(c)(2), 30 U.S.C. § 1269(c)(2), contain desirable elements that are acceptable state police power measures if reasonably interpreted.

Whether federal bureaucracy enforces Congress' decree, or whether a State agrees to follow Congress' decree, at the risk of federal imposition of a program, does not alter the fact that Congress has removed from state and local legislative bodies their traditional authority to determine the most appropriate use of certain important lands within their jurisdiction according to their citizens' particular needs, as determined after those local citizens petition their local or state elected officials.[8] Illinois would distinguish this statutory scheme from situations where eligibility to use a "carrot" of federal funds is contingent on adoption of a specific program. While abuses also exist of the "carrot" approach, it is sufficient to note here that the complained of land control provisions are federally enforced in a state even if the state decides to pass up the "carrot". The provisions for federal control of farmland use must be held to be constitutionally faulty, or else the structure of the federal system will have been shattered.

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[8] As examples of cases where land use authority has been found to be the province of State and local governments, see *Warth* v. *Seldin*, 422 U.S. 490, 508 (n. 18) (1975); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 129 (1978).

II.

AFFIRMANCE OF THE COURT BELOW WILL NOT ADVERSELY AFFECT ILLINOIS' PRIME FARMLAND

Illinois addresses this Court as a state committed to preserving to its posterity both the blessings of nature and of the Constitution. At stake in this case are the reserved rights of states and their citizens under the Constitution. Illinois is committed to a long-term effort to secure and protect its natural bounty of prime farmlands against irreversible loss or degradation. Attached as Appendix B, is an Executive Order of Illinois' Governor, dated July 22, 1980, which confirms the policy of the State "to protect, through the administration of its current programs and regulations, the state's prime agricultural land from irreversible conversion to uses which result in its loss as an environmental or essential food production resource." In an official statement at a recent federal public hearing on the Illinois "permanent program" submittal, pending at this date before the Secretary of the Interior under § 503 of the Act, 30 U.S.C. § 1253, the Illinois Department of Mines and Minerals declared, in effect, that if court action (such as this) or other events result in a federal scheme of regulation less than adequate to protect Illinois' agricultural resources, it is prepared to work to assure such protection. Finally in Appendix C, there is reprinted a recent statement of Illinois' intent to protect prime farmland and other lands well suited to producing crops, as embodied in Rule 1104 (a Rule promulgated prior to the enactment of the federal Act) which appears in the August 20, 1980 *Congressional Record* at pages S11279; we respectfully ask the Court to take judicial notice of these statements. Careful examination shows that in Illinois' mining counties, one million more acres of rowcrop lands are required, if mined, to be restored to their row-cropping capability than the federal Act requires.

Before the Act became law, Illinois was already strictly regulating surface mining within its borders. Among the most progressive of its regulations was Rule 1104, adopted in 1976, which prescribes topsoil removal, plus detailed requirements for a minimum 48 inches of root medium depth and texture of reclaimed land which was capable of growing rowcrops prior to its being mined. These requirements were developed by soils scientists with the particular goal of assuring adequate water holding capacity in the reclaimed soil to support rowcrops. They will continue to assure high quality immediate reclamation of coal mined lands.

III.

THE JUDGMENT BELOW IS BASED ON A FULL TRIAL AND AMPLE PRECEDENT, AND IT SHOULD BE AFFIRMED ON THE BASIS THAT THE COMMERCE POWER HAS BEEN EXCEEDED AND THE TENTH AMENDMENT INFRINGED

At stake in this case is Congress' usurpation of a traditional role, not ever exercised in like manner by individuals, which belongs to states and localities: the governmental role of land use designation for land within their respective jurisdictions. If this Court allows Congress to designate land use for land which has been mined, premised on what the Court below properly found to be a trivial percentage of the acreage of concern, the precedent will be established for Congress to designate land use for any land, anywhere in the nation. If Congress may designate land use and handling for reclaimed land from which coal has been removed, and has long since entered into the stream of commerce, then Congress may presumably make land use decisions for land from which corn, soybeans, cattle, timber, cotton, and any other product of the land are taken and are sent into the stream of commerce. If coal, which is taken from 5,000 to 6,000 acres of Illinois' land annually, affects interstate commerce substantially to warrant Congressional decree of land uses and handling, then all the more substantial an effect will be made by grain, which comes from hundreds of thousands of acres of Illinois. If the provisions of this Act, found below to be violative of the Tenth Amendment, are allowed to stand, there is no clear or perceivable limit to the authority of Congress to designate the use of lands owned by private individuals.

Past opinions of members of this Court contain expressions that in a representative government such an ours, the sole restraints on the Commerce power lie within Congress. "The wisdom and the discretion of Congress, their identity with the

people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse." *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), (dissent by Justice Brennan, et al, quoting *Gibbons* v. *Ogden*, 9 Wheat. 1, 197 (1824).). Unfortunately, the actual legislative history of a proposed amendment to the federal Act in question here is proof that this avenue of protection is undependable, and can be expected to be undependable whenever representatives from many states can combine to order control over private resources and land use within a relative few. S. 1403 passed the Senate in September of 1979 by a vote of 68-26, but was stopped by a single representative in the House, who would not allow the bill to be voted on or discussed, despite a request to do so from a majority of the House Subcommittee of which he is Chairman, to which the bill was sent. S.1403 was then attached to a House bill in August of 1980 and passed the Senate once again, this time by a voice vote. Conference committee members have been chosen, not one of whom is from Illinois or Indiana.[9]

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[9] The mention of S. 1403 is illustrative of the undependability of Congress to protect resources in a limited number of states. S. 1403, itself, while quite helpful to the restoration of balance in the administration of the Act, would not reach or moot the issues presented by this case.

The undependability of Congress in restraining itself in its exercise of the Commerce power manifests itself in ways other than parliamentary maneuvers, or the "tyranny" of a majority. One member of the Senate recently sponsored an amendment to a renewed attempt to obtain passage of S. 1403, by Amendment No. 1496, to H.R. 1197. This amendment appears in a peculiarly open-ended way to authorize the Secretary of Interior to promulgate regulations for operation on prime farmlands in 30 CFR 823, in its form at the (future) date of enactment, together with any future changes the Secretary "on his own motion" may choose. Yet, under repeated inquiry, the Senator stated to his colleagues that in proposing his amendment he was "honoring [Judge Noland's] opinion." 126 Cong. Rec. S. 11399 (daily ed. Aug. 22, 1980). A casual review of the case below demonstrates the obvious inaccuracy of the statement.

Illinois produces vast amounts of grains and livestock, as well as a large amount of coal. Its government, and its local governments, have traditionally functioned as designators of land use. The Act, while displacing them from this role, thereby absorbing on behalf of the federal government one of the powers which has traditionally made state and local governments viable, and useful, members of a federal system, makes government less responsible to the people it affects.

CONCLUSION

The Court below had the benefit of a full record from a fair and full hearing, and took approximately one year before issuing its Order. The decision is well considered and is supported by ample precedent. Illinois urges this Court to affirm its holding that the Commerce Power has been exceeded and the Tenth Amendment infringed, in order to preserve to posterity a balanced government, properly and practically responsive to its people.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General, State of Illinois
Room 900
160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2501

HARVEY M. SHELDON
LINDA L. ROSS
Suite 2300
One North LaSalle Street
Chicago, Illinois 60602
(312) 346-7800

Of Counsel.

APPENDIX

APPENDIX A

Illinois Law Requiring Restoration of Productive Capacity, Effective July 1, 1975

Ill. Rev. Stat., 1979, Ch. 96½, par. 4507. Duties of Operator

§ 6. Duties of Operator. Every operator to whom a permit is issued pursuant to the provisions of this Act may engage in surface mining upon the lands described in the permit upon the performance of and subject to the following requirements with respect to such lands:

* * *

(j) When the Director determines that the land to be affected is (1) capable of being reclaimed for row-crop agricultural purposes and suitable for row-crop agricultural purposes based on United States Soil Conservation Service soil survey classifications of the affected land prior to mining, and (2) when the Director determines that the optimum future use of the land affected is for row-crop agricultural purposes, the affected land shall be graded to the approximate original grade of the land provided that the final cut and submerged roadways may remain if the Department determines that such final cut or roadways could form a water impoundment capable of supporting desirable uses such as water for livestock or wildlife; and if to be used for fish life, shall have minimum depths in accordance with standards for fish stocking as recommended by the Department, and provided further that the box cut spoil shall be graded in accordance with subparagraph (a) of Section 6:

The reclamation requirements in this Section do not apply to affected land used for a sanitary land fill if such sanitary landfill is approved by the Environmental Protection Agency. The Environmental Protection Agency may regulate the amount of land to be used for the purpose and may establish a time schedule for the orderly and timely completion of such

sanitary landfill. Any affected land designated for sanitary landfill and not used for such purpose within 5 years is subject to the reclamation provisions of this Section;

On all affected lands to be graded to the approximate original grade under this subsection (j) all or part of the darkened surface soil, as defined in this Act, shall be segregated during the stripping process and replaced as a final cover as a last step in the required grading. When available in such depth, at least 18 inches of the darkened surface soil shall be segregated and replaced. When less than 18 inches of darkened surface soil exists all such lesser amounts shall be segregated and replaced. In no case under this subsection (j) shall less than the top 8 inches of surface soil, darkened or not, be segregated and replaced. This segregation and replacement requirement may be altered by the Department only if it is determined upon the advice of competent soil scientists that other material available in the cast overburden would be suitable in meeting the reclamation requirements. Below the darkened surface soil the replaced material shall be suitable as an agricultural root medium. The Department shall determine by rules and regulations what constitutes a suitable agricultural root medium of composition and depth. On all lands to be reclaimed under this subsection (j), the operator shall not be required to create a soil condition better than that which existed prior to surface mining;

APPENDIX B

STATE OF ILLINOIS

EXECUTIVE ORDER Number 4 (1980)

PRESERVATION OF ILLINOIS FARMLAND

The natural resources of Illinois—land, minerals, water, and air—are both finite and fragile. In the absence of wise use and consistent management practices, these resources are threatened by irreversible damage or loss. Protection of the State's natural resources is essential to guard the public health, safety, and welfare, and to assure an adequate natural resource supply and quality for use and enjoyment by future generations.

Since World War II, the amount of Illinois land dedicated to agriculture has steadily declined at an average rate of aproximately 100,000 acres per year. This substantial loss of farmlands is the equivalent of eight average-sized Illinois counties. If this trend continues, the State will lose the equivalent of another five or six counties by the end of the century.

The conversion and loss of agricultural land has diminished Illinois' cropland base and affects environmental quality. The supply of land most suitable for farming is finite. Conversion of this land to urban development and other non-farm uses reduces future food production capability and may ultimately undermine agriculture as a major economic activity in Illinois. With less prime farmland available, there will tend to be greater reliance on marginally productive land, resulting in greater soil erosion, increased fertilizer requirements and increased environmental damage. Loss of agricultural land can also reduce the beneficial role which the land itself can play. Agricultural land reduces runoff by absorbing precipitation, aids in replenishing groundwater supplies and can buffer environmentally sensitive areas from encroaching development.

The importance of preserving our agricultural land base has been recognized by the Illinois Rural Planning Council, the Task Force on the Future of Illinois, and in the State's "Comprehensive Growth and Resource Conservation Policies". Each of these efforts recommends that the State minimize the conversion of prime farmland that results from the direct or indirect effects of State programs and also encourages the achievement of related goals, such as reducing the loss of soil through erosion.

Agencies of the Executive Branch perform numerous functions which effect the management of Illinois' natural resources, including the conversion of prime agricultural land. Decisions on State grants and capital improvements may have significant impact on the conversion process, yet often they may not adequately recognize that agricultural land is a finite resource that can be irretrievably diminished as a result of State actions.

Currently there is no single policy or coordinating mechanism to ensure that State actions do not unnecessarily encourage the conversion of prime farmland to non-farm uses, particularly when there may be alternatives available that are less destructive to our best agricultural lands.

Accordingly, I order the following:

I. It shall be the policy of the State of Illinois to protect, through the administration of its current programs and regulations, the State's prime agricultural land from irreversible conversion to uses which result in its loss as an environmental or essential food production resource.

II. The Department of Argiculture shall be the lead agency for implementing this policy in the State of Illinois.

A. The agencies named below shall each prepare and submit to the Governor, with a copy to the Illinois Department of Argiculture, and Agricultural Land Preservation Policy no later than one year from the

effective date of this Executive Order. This policy shall include an analysis of the impact on agricultural land conversions caused by their programs, regulations, procedures and operations. The policy shall also detail measures that can be implemented by the agency which will mitigate conversions to the maximum extent practicable. Each policy shall provide for a greater degree of protection for Classes I, II, and III lands than for Classes IV through VIII (as defined by the U.S. Department of Agriculture). The agencies are: Capital Development Board, Department of Conservation, Department of Commerce and Community Affairs, Environmental Protection Agency, Institute of Natural Resources, Department of Mines and Minerals, the Department of Transportation, Bureau of the Budget, and the Illinois Commerce Commission.

B. Those named State agencies shall participate in an inter-agency committee chaired by the Illinois Department of Agriculture to solve mutual problems in meeting the objectives of agricultural land preservation.

C. The Department of Agriculture will analyze State funded capital projects that impact farmland conversion and advise the Governor's Office as to the consistency of agency actions with the policy established by this Executive Order.

D. After the second anniversary of this Executive Order, all conversions of agricultural lands by any State agency shall meet the criteria specified in that agency's Agricultural Lands Preservation Policy.

III. EFFECTIVE DATE

This Executive Order shall become effective on July 22, 1980.

James R. Thompson
Governor

APPENDIX C

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SENATOR PERCY:

I would like to submit for the RECORD a copy of a letter I received this morning from Mr. Douglas Downing, supervisor of the land reclamation division of Illinois' Bureau of Mines and Minerals, in which he affirms Illinois' total commitment to prime farmland reclamation and a 1982 grandfathering sunset.

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STATEMENT TO SENATOR CHARLES PERCY FROM THE ILLINOIS DEPARTMENT OF MINES AND MINERALS ON PRIME FARMLAND AND CROPLAND RECLAMATION

The State of Illinois has consistently and historically advocated quality reclamation. We have every intention of promulgating and enforcing a law and regulations which carry out the requirements of P.L. 95-87. Two specific examples will prove that Illinois had the goal of good reclamation before the federal law was passed, and that we continue to impose requirements in excess of the federal law to insure retention of agricultural capability on the maximum number of acres.

First, in 1976, Illinois enacted Rule 1104, developed by soils scientists of international reputation from the University of Illinois and other Illinois schools. Rule 1104 has been adopted by the Illinois legislature for the permanent program, even though the federal law doesn't require it. During the permanent program, under Rule 1104 standards, operators will be required to return to rowcrop capability, land which does not meet the definition of prime farmland, but which is nevertheless

capable of producing rowcrops. By contrast, the federal regulations merely require that such land be revegetated. Since there are approximately 1,023,181 acres of land in Illinois mining counties which would be subject to Rule 1104 standards but not to prime farmland requirements, this means that Illinois would require a return to rowcrop capability for over one million acres more than would federal law alone.

Second, the State of Illinois was the originator of the idea to limit prime farmland grandfathering to 1982. Such a limitation has been placed on every single exemption granted by Illinois despite the fact that no time limitation is contained in the Federal Act or has ever been contained in adopted federal regulations. However, OSM has adopted this idea and is now proposing it as part of its proposed exemption regulations.

To date, Illinois has issued permits for approximately 2,700 acres upon which a prime farmland restoration plan has been submitted and approved. The federal prime farmland standards will apply. More acreage will be subject to these standards as time goes on, since Illinois has always interpreted the grandfather clause as a transition exemption only, as is obvious from the 1982 limitation. Of the acreage grandfathered by Illinois under the federal Act and regulations, only about 12,000 acres of it will actually be mined. Rule 1104 standards apply to grandfathered land. It's time that the facts be made known concerning the reclamation which will be required of grandfathered land in Illinois. The exempted land will have a minimum of eight inches of topsoil saved and replaced. Under the federal prime farmland rules, only a minimum of six inches would have to be saved and replaced. The entire rooting media of exempted land will be 4′ deep. Under the federal prime farmland rules, the rooting media would be 4′ also, unless there was a root inhibiting zone, or fragipan, within the premining surface 4′, in which case the prime farmland rules only require rooting media to the depth of the premining fragipan. Finally, the exempted land will have a rooting media of a mixture of the B-C horizon. Under the

prime farmland rules, a mixture of the B-C horizon is specifically allowed. The exempted land will be released from bond only when capability to achieve 90 percent of premining yield is shown.

Illinois is adopting the prime farmland standards and will enforce them, because there is a negligible difference between those standards and Rule 1104 standards, except for the many acres of fragipan soils in Southern Illinois. However, we will continue to apply Rule 1104 standards to restore the rowcrop capable land that is left out of the federal prime farmland requirements.

DOUGLAS DOWNING

Supervisor, Illinois Department of Mines and Minerals

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FACT SHEET: GRANDFATHERING IN ILLINOIS

(Approximate acreage)

Total Acres Grandfathered[1] To Date (8/80) 29,903.

Prime Farmland Grandfathered, 16, 059.

Prime Farmland Grandfathered which is planned to be mined, 12,143.

Federal Prime Farmland Restoration Plan—Approvals to Date (approximate acreage), 2,700.

Grandfathered land—1104 Reclamation Standards, Minimum of 8″ topsoil salvaged Root Zone 4′ deep.

Federal Prime Farmland Reclamation Standards, Minimum of 6″ topsoil salvaged. Root zone 4′ deep, or less if root inhibiting zone, in which case root zone restored only to depth where premining root inhibiting zone existed.

[1] For convenience, exemptions are requested and granted or denied for entire permit areas, without specifically delineating prime farmland soils within the permit areas. In other words, this figure represents both prime farmland and non-prime farmland.

Root zone of B/C mixture. Texture requirements for root zone: Maximum of 40% clay content.

Root zone B over C or B/C mixture. None.

Prime Farmland and Rule 1104 Land, Illinois Mining Counties (Approximate Acreage):

Prime Farmland, 2,049,800.

Row Crop in Excess of Prime Farmland, 1,025,181.

Prime Farmland Plus Row Crop, 3,074,981.

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